(7) (4)

Nos. 90-408 and 90-577
CONSOLIDATED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Respondent,

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Cross-Petitioner,
v.
COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF PETITIONERS/CROSS-RESPONDENTS, COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER

JEFFREY C. SULLIVAN
Prosecuting Attorney
Yakima County, Washington
JOHN V. STAFFAN *
Deputy Prosecuting Attorney
Room 329, Courthouse
Yakima, Washington 98901
(509) 575-4141
Counsel for Petitioners/ Cross-Respondents, Yakima County, et al.

R. WAYNE BJUR
TIM WEAVER
COCKRILL, WEAVER & BJUR, P.S.
316 North Third Street
P.O. Box 487
Yakima, Washington 98907
(509) 575-1500
Counsel for Respondent/Cross-Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Has the authority for state taxation of Indian owned fee lands, granted by Congress in Section 6 of the General Allotment Act (25 U.S.C. 349), been withdrawn.

2. In light of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994, does the validity of state property taxes, upon Indian-owned fee lands within an Indian reservation, as authorized by Congress in 25 U.S.C. 349 (Indian General Allotment Act, Section 6), depend upon a case by case analysis of the economic, political, health and welfare effects of such tax upon the resident tribe?

3. Is the grant of authority in 25 U.S.C. 349 for the taxation of reservation Indians and their fee lands limited to ad valorem taxes, or does it extend to excise taxes on the sale of such fee lands?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-408 and 90-577
Consolidated

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Respondent,

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Cross-Petitioner,
v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF PETITIONERS/CROSS-RESPONDENTS,
COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER**

OPINIONS BELOW

The amended opinion and judgment of the Court of Appeals for the Ninth Circuit is reported at 903 F.2d

1207, (1990) and is reprinted in the Appendix to the County's Petition for Writ of Certiorari (Cert. Pet. #90-408 at pp. 1a-30a).

The opinion of the United States District Court for the Eastern District of Washington was not published. It is reproduced in the Appendix to the County's Petition for Writ of Certiorari (Cert. Pet. #90-408 at pp. 34a-39a). The District Court's Judgment is reprinted in the same Apendix at pp. 32a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The first opinion of the Court of Appeals was issued on January 9, 1990. On January 25, 1990, the Appellants Yakima County and Yakima County Treasurer (Petitioners/Cross-Respondents herein) filed Petition for Rehearing with the Court of Appeals. On February 21, 1990, the Appellee Confederated Tribes (Respondent/Cross-Petitioner herein) filed Petition for Rehearing with the Court of Appeals.

On May 16, 1990, the Court of Appeals issued its Amended Opinion and Judgment, the amendment relating to matter not directly addressed in the Rehearing Petitions and without disposing of the Rehearing Petitions.

On June 7, 1990, the Court of Appeals entered its Order Denying both the Petitions for Rehearing.

The Petition for Writ of Certiorari (#90-408) of the Petitioners/Cross-Respondents Yakima County and the Yakima County Treasurer was filed in this Court on September 5, 1990. The Cross-Petition for Writ of Certiorari (#90-577) of the Respondent/Cross-Petitioner, Confederated Tribes and Bands of the Yakim Indian Nation, was filed in this Court on October 3, 1990.

STATUTE INVOLVED

This case involves Section 6 of the Act of February 9, 1887 (24 Stat. 390), as amended by the Act of May 8, 1906 (34 Stat. 182), now codified as 25 U.S.C. 349, which reads as follows:

> 349. Patents in fee to allottees
>
> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act, shall not extend to any Indians in the former Indian Territory.

STATEMENT OF THE CASE

The Yakima Indian Reservation was established by the Treaty with the Yakimas in 1855. (12 Stat. 951) The Reservation encompasses approximately 1.3 million acres in southeastern Washington State, almost all in Yakima County. (Appendix to Cert. Pet. #90-408, p. 6a) On February 8, 1887, Congress passed the Indian General

Allotment Act, also known as the Dawes Act, but referred to hereinafter simply as the Allotment Act. The Allotment Act authorized the Secretary of Interior to allot parcels of Reservation land to individual Indians, in trust, for a period of 25 years. Following the trust period the allottee could be granted a patent to the allotted land in fee with all restrictions on alienation removed, which then made the allottee subject to the general laws of the state with respect to the land. (25 U.S.C. 349, Clause 1) By the Act of May 8, 1906, also known as the Burke Act, the Allotment Act was amended to permit the Secretary to shorten or waive the 25-year allotment trust period and proceed directly to issue fee patents.

Under the authority of the Allotment Act there has been extensive allotment and patenting of lands from within the Yakima Reservation to individual Yakima Indians. As noted by this Court in the recent case of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989), involving the same reservation and principal litigants as this case, fee patented lands from within the Yakima Reservation now comprise about 20% (or roughly a quarter million acres) of the total. The fee lands are scattered throughout the Reservation area in checkerboard fashion, with substantial clusters in three incorporated towns. (J.A. p. 43; 109 S.Ct. at 3000). Some of the fee lands are still owned by Yakima Indians or have been reacquired, by individual members or the Tribe, from intervening owners.

For decades, prior to this lawsuit, Yakima County imposed the Washington general property tax on the fee lands inside the Reservation, whether owned by the Yakima Tribe or its members or (as most of the fee lands now are), by non-Indians. (Affidavit of Ralph Huck; J.A. pp. 29-30) Likewise, prior to this lawsuit, Yakima County imposed and collected real estate excise tax on the sale of those lands which were themselves taxed. (Affidavit of Nancy Davidson; J.A. pp. 27-28).

In 1987, Yakima County commenced its annual, general tax foreclosure proceeding in state court against those real properties throughout the County with 3-year-past-due taxes, including several properties owned in fee by the Yakima Tribe or individual Yakima members. (Complaint of Confederated Tribes, J.A. pp. 2-7; Answer of Yakima County, J.A. pp. 31-35). Thereafter on November 9, 1987, the Yakima Tribe, for itself and its members, brought this action in the District Court seeking injunctions against; 1) the foreclosure sale of those tribal-owned and member-owned fee properties within the Reservation; 2) continued imposition of the ad valorem taxes on these lands; and 3) collection of state excise tax on sales of these properties by the Tribe or its members. (*Id.*) The Tribe's substantial theory was that the Congressional authorization for state taxation of Indian fee lands, found in 25 U.S.C. 349, was no longer the law, in view of this Court's decision in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Following an agreed order temporarily restraining the foreclosure sales of the Indian properties, the case came before the District Court on cross-motions for summary judgment. (J.A. pp. 17, 25-26) The District Court granted summary judgment to the Tribe, accepting the Tribe's theory that, according to *Moe*, the authority for state taxation contained in 25 U.S.C. 349 had been effectively made void. (Appendix to cert. Pet. #90-408, pp. 34a-39a)

On January, 1990, the Ninth Circuit Court of Appeals, in a generally well-reasoned opinion, reversed the District Court, holding that 25 U.S.C. still provides authority for state taxation of Indian-owned fee lands inside the boundaries of the Reservation. However, based on the checkerboard pattern of land ownership within the Reservation and on a passage concerning tribal zoning rights from Justice White's plurality opinion in the recent case of *Brendale v. Confederated Tribes*, 109 S.Ct., 2994 (1989) at pg. 3008, it remanded the case for trial on what it called "the Brendale test" (i.e. whether the

taxes would seriously impact and imperial the political integrity, economic security, health or welfare of the Tribe). (*Id.* at pp. 1a-30a) Both parties filed timely petitions for rehearing. (Court of Appeals Docket No.'s 22 and 23) The Tribe's petition also requested rehearing en banc. (*Id.*) Thereafter, not having previously participated in the case, the United States filed an amicus curiae brief in support of the Tribe's rehearing petition and en banc request. (*Id.* Docket Nos. 24 and 27) While the rehearing petitions were pending, the Court of Appeals amended its previous opinion as to the excise tax issue, ruling that real estate excise taxes are not within the scope of Sec. 349. (*Id.* Docket Nos. 33 and 34) The cross-petitions for rehearing were denied by Order entered on June 7, 1990. (*Id.* Docket No. 36)

SUMMARY OF ARGUMENT

Congress, pursuant to its plenary power over Indian Commerce, adopted the General Allotment Act of 1887 to permit the allotment in trust of tribal lands to individual tribe members.

The Act provided for the issuance, after a period of trust protection, of an unrestricted fee patent for the land to the member, and that the member then became subject to general state laws. In 1906, it was held by this Court that those general laws included property tax laws vis-a-vis the land. (*Goudy v. Meath*, 203 U.S. 146)

The same year, while Goudy was pending, Congress amended the statute to permit the shortending of the trust period and providing that, upon the issuance of the fee patent, "all restrictions as to the sale, encumbrance or taxation of said land shall be removed." (25 U.S.C. 349)

After several decades of allotments and patents, Congress changed its policy regarding reservations and tribes and stopped the allotments and patents with the Indian Reorganization Act of 1934. The IRA, however,

can easily be reconciled with the tax provision of the Allotment Act so as to give effect to both, and neither the Allotment Act nor 25 U.S.C. 349 has ever been repealed.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) represents this Court's refusal, in light of the aforementioned policy change, to grant general tax authority over all reservation Indians' property and activities, regardless of their connection to trust or fee lands. It should not be considered (as contended by the Tribe below and as ruled by the District Court) a declaration of the implied repeal of state taxing authority under 25 U.S.C. 349. This conclusion is supported by other applicable cases, executive pronouncements, and modern statutes, especially a 1964 amendment to the Yakima Nation land acquisition statute of 1955. This 1964 statute, clearly recognized the taxability of reservation Indian fee lands.

The Court of Appeals decision, that the state's power to tax under 349 was limited by *Brendale v. Confederated Tribes*, is not supported by a proper reading of *Brendale* nor by good policy. Applying the "Brendale test" to this tax question, would engender the kind of confusion which was, according to the same opinion, to be avoided. Instead, applicable legal principals as well as good policy call for a decision based on the language used by Congress in 25 U.S.C. 349.

The real estate excise tax of the County herein, in light of *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), should be considered one of the taxes the restrictions as to which are removed by the issuance of a fee patent to a particular parcel of land. Like the property tax it should be upheld, at least as to sales of land to non-Indians.

ARGUMENT

1. Congress has the power to authorize these taxes.

Congress has plenary power over Indian affairs. This power flows from the United States Constitution, Art. I, Sec. 8(3) and the Supremacy Clause of Article VI.

This power has been long and consistently recognized by this Court.[1] Exercise of this power overrides prior conflicting acts or treaties. As stated in the *Cherokee Tobacco, supra* at p. 621:

> The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubts as to its proper solution. A treaty may supersede a prior act of Congress (citation omitted) and an act of Congress may supersede a prior treaty. (citation omitted)

In *United States v. McGowan*, 302 U.S. 535 (1938) the status of the lands in the Reno Indian Colony as "Indian country" for purposes of Indian liquor prosecutions and the power of Congress as to the establishment and maintenance of the Colony were examined. Justice Black, for the Court, explained that in such a jurisdictional inquiry, two factors were important: legislative history and traditional U.S. policy on the subject (in this case Indian liquior regulation). (302 U.S. 536) Based on the apparent congressional purpose of protecting the Indians in the colony, the superintendence of the Colony for that purpose, and the tradition of extensive Indian liquor regulation by the United States the Colony was held to be "Indian country" for purposes of the criminal prosecution. More importantly, the Court observed:

---

[1] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Cherokee Tobacco v. United States*, 78 U.S. (11 Wall) 616 (1871); *Head Money Cases*, 112 U.S. 580 (1884); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913); *Williams v. Lee*, 358 U.S. 217 (1959); *U.S. v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 1670 (1978).

> Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out . . .

302 U.S. at 536.

More recently, in *Santa Clara Pueblo v. Martinez, supra,* the principle was explained in the civil context:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. (citations omitted) This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.

436 U.S. at 48. Accord, *U.S. v. Wheeler,* 435 U.S. 313, 323.

While true to the principle of plenary Congressional power over Indian commerce, a series of modern decisions, beginning with *Mescalero Apache v. Jones,* 411 U.S. 145 (1973) and *McClanahan v. Ariz. Tax Comm.,* 411 U.S. 164 (1973), testing the powers of states to tax Indians as to their reservation activities and property, have given a negative formulation to the same rule. According to this later formulation, states can *not* tax Indians, their reservation activities and property, *without* the authorization of Congress.

Justice White, writing for a divided court in *Mescalero* put it this way:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. State Tax Commis sion of Arizona, *supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible without congressional content.

411 U.S. at 148.

Justice Marshall writing for a unanimous court in *McClanahan* gave a slightly more flexible formulation, describing the new trend as one of pre-emption.[2]

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (citing *Mescalero*) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. (citations omitted)

411 U.S. at 172. Justice Marshall went on to say that the relevant treaties and statutes are to be read against the "backdrop" of Indian sovereignty. But against this "backdrop" it is still the applicable treaties and statutes which define the limits of state power.

The existence of a sphere of tribal sovereignty had earlier been recognized. See, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959). The contribution of *McClanahan* was to position this sovereignty as a background reference for the analysis of all cases such as the present one where state taxing authority over tribal Indians, their reservation activities and property are at issue.

The problem of how to identify and weigh the McClanahan tribal sovereignty element in a pre-emption case was treated in *Rice v. Rehner*, 463 U.S. 713 (1983).

> When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some

---

[2] By this time (1973) the doctrine of federal pre-emption was already well developed and had been employed to resolve a question of state taxes on a licensed Indian trader several years earlier, based on the extensive federal regulation of the subject. *Warren Trading Post v. Ariz. Tax Comm.*, 380 U.S. 685 (1965). Reservation Indian land tenure and taxation had also been the subject of much federal legislation, so pre-emption was a natural way to approach this and other similar cases which followed it. It was less suitable for *Mescalero* inasmuch as the subjects of taxation in that case were off the reservation.

> respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect " 'except where Congress has expressly provided that state laws shall apply.' " (citations omitted) Repeal by implication of an established tradition of immunity or self-governance is disfavored. (citation) If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. (citations omitted)

463 U.S. at 719-720.

In this case (1) there is no established tradition of Indian immunity from taxes on their reservation fee lands; indeed, the long-established tradition is that these lands are taxable; (2) the applicable acts of Congress contain unmistakable authorization for taxing these lands; far from withdrawing or repealing that authorization, Congress consistently acknowledged it in the intervening years; (3) there is no genuine ambiguity in the applicable statutes as they relate to Yakima County's taxes on Indian-owned reservation fee lands and the sale thereof.

The established tradition as to taxation of fee lands within the reservation grows directly out of 25 U.S.C. 349 and the other statutes made with reference to it. Therefore, before discussing the tradition, we will first turn to examine the applicable acts of Congress bearing directly or indirectly on the challenged Washington taxes.

2. Congress has authorized the taxation of the lands involved in this case. That authority has not been withdrawn and subsequent acts of Congress are consistent with such taxation.

The General Allotment Act of 1887, 24 Stat. 388, c. 119, Act of Feb. 8, 1887, is now embodied in 25 U.S.C. 331 *et seq.* Section 1 of the Act (now 25 U.S.C. 331) provides for Presidential allotments of reservations lands to in-

dividual Indians. Section 5 of the original Act (now 25 U.S.C. 348) provided for an initial trust allotment of 25 years duration (the period being extendable by the President) after which the trust was to be terminated and the land patented to the allottee in fee. 25 U.S.C. 348 reads, in pertinent part:

> Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or, in case of his decease, to his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. . . .

Section 6 of the original 1887 Act, now embodied in 25 U.S.C. 349, defined the consequences for the allottee of the issuance of the *fee* patent, in place of the original *trust* patent. The pertinent portion of the original Section 6 is still a part of the statute and reads as follows:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . .

Act of Feb. 8, 1887, c. 119, Sec. 6, 24 Stat. 390. It was against this statutory background that the case of *Goudy v. Meath*, 203 U.S. 146 (1906), arose.

The issue of *Goudy* was whether the civil laws to which James Goudy, was subject, as an Indian patent grantee, included the Washington real property tax laws. The answer of this Court was yes. Earlier in 1906, shortly before the *Goudy* case was decided, Congress amended Section 6 of the 1887 Act, adding, among other language, this proviso:

> Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, *whenever* he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a *patent in fee simple*, and thereafter all *restrictions as to sale*, encumbrance, or *taxation of said land shall be removed* . . .

34 Stat. 182, Act of May 8, 1906, c. 2348 (emphasis added). This proviso had two substantive effects: one was to allow the 25 year trust allotment period of Section 5 to be shortened or dispensed with completely; the other was to make plain what was only implicit in the 1887 version of Section 6, that issuance of the fee patent to an Indian land allottee subjected the land to state taxation. Thus Congress cleared up this issue for all cases arising after 1906, and, for the interim, provided guidance for the Court in its resolution of the Goudy issue.

A full understanding of the present case and the District Court's decision herein also requires a close look at the Indian Reorganization Act of 1934, June 18, 1934, c. 576, 48 Stat. 984. This Act has been cited as "inconsistent" with the General Allotment Act, but more importantly it was cited in the decision of the Supreme Court in *Moe*, 425 at 463, 479, which was the ultimate authority relied on by the District Court. (Appendix to Cert. Pet. #90-408, pp. 34a-39a).

The Indian Reorganization Act (IRA) halted the breakup of the reservation, by allotment, which had been occur-

ring under the Allotment Act, provided for replacement of lost tribal lands and for reorganization of tribal governments, elections,[3] and the like. Sections 1, 2 and 5 of the Act deserve mention. Sec. 1 (25 U.S.C. 461) put an end to the issuance of individual fee patents and Sec. 2 (now 25 U.S.C. 462) indefinitely extended the trust restrictions on lands already allotted but still in trust (*i.e.*, whose trust period had not expired) as of June 18, 1934. Section 5 (25 U.S.C. 465) authorizes the Secretary of Interior to re-acquire reservation lands and to acquire off-reservation lands for the Indians, and provides that those lands acquired under the provisions of this Act shall be exempt from state and local taxation. The pertinent portions of 25 U.S.C. 465 are:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians. . . Title to any *lands* or rights *acquired pursuant to* [this Act] *shall be taken* in the name of the United States in trust . . ., and such lands or rights *shall be exempt from State and local taxation.* 48 Stat. 985, c. 576, Section 5. (emphasis added; *infra*, App. p. 1a)

It is clear from the foregoing passage that lands acquired under authority of the Reorganization Act of 1934 by the United States (in trust) for Indians would become, by virtue of such acquisition, exempt from the kind of taxes at issue in our present case. However, it is also clear that any lands otherwise subject to state taxation (i.e., those previously patented to Indians in fee and

[3] Section 18 (25 U.S.C. 478 contains a provision for elections for the acceptance or rejection of tribal coverage under the Act. Due to rejection of IRA coverage by some tribes, executive orders were used for a time to extend the trust status of allotments on some reservations. See 25 C.F.R. Ch. I, Appendix Subchapter 0 (94-1-90 Ed.) at p. 746 *et seq.*

therefore taxable under Section 6 of the Allotment Act) and not re-acquired by the U.S. for Indians according to the new 1934 Act, would by implication, *remain* taxable. By providing state tax exemption for re-acquired fee lands, on an *acquisition-by-acquisition basis*, Congress revealed its own understanding that, absent re-acquisition of these lands, they remain taxable. This is quite contrary to the view of the Tribe and the District Court that the Reorganization Act impliedly repealed the state property tax provision (Section 6) of the Allotment Act. On the contrary, this treatment of state property tax liability in the Reorganization Act is perfectly harmonious with the Allotment Act's treatment of the same subject.

This analysis is consistent with the rule that statutes are to be interpreted with regard to their historical and legal context. *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898). 25 U.S.C. 349 has as its salient historical and legal context, the case of *Goudy v. Meath, supra.* The context of the Indian Reorganization Act of 1934 includes 25 U.S.C. 349, the many Indian fee patents which had already been granted by 1934, and the consequent incorporation of reservation fee lands into the state and county tax base.

One of the drafters of the IRA of 1934 was Felix S. Cohen. Rutgers Law Revision, Vol. IX, pp. 345 *et seq.* Cohen was appointed to head the Indian Law Survey of the Department of Justice in 1939. *Id.* He wrote the Handbook of Federal Indian Law, published in 1942. *Id.* In Chapter 13, Sec. 3.B, of the Handbook he addresses the property tax question involved in this case, together with that of "forced fee patents" (discussed in the Brief of Amicus Curiae LaPlata County, et al., herein, at pp. 9-21). Cohen says:

> Therefore, it would appear that the allottee under the General Allotment Act obtains a vested right to tax exemption which cannot be taken from him without his consent. Should he, on the other hand, apply for the issuance of a fee patent and be accorded one pur-

> suant to law, there seems no reason to believe that his lands would not thereby become subject to state taxation. (footnotes omitted)

Cohen 1st ed. p. 259.

This case does not involve the forced, or non-consentual patents referred to in this passage.[4] Rather, it involves only those lands as Cohen describes as "subject to state taxation", a mere eight years after his own work on the Act itself.

In sum then, the keys to exemption from state property tax on any reservation Indian land, as based on the Reorganization Act, are: (1) property was *continued in trust* status, by virtue of the Act, or (2) the property has been *re-acquired in trust* under the authority of the Act. The lands involved in this case are in neither category.

In enacting the IRA, Congress clearly abandoned the assimilation policy which had been the basis for the Allotment Act of 1887 and its 1906 amendment. But the effect of the IRA was not to erase at one stroke the tax effects of 47 years of allotment history. Rather, it was to preserve the 1934 status quo and allow for step-by-step restoration of the tax exempt tribal land base. The IRA and 25 U.S.C. 465 implicitly recognize the continued taxability of reservation Indian fee lands, so long as they remain in unrestricted status, and the statutes do not conflict on this point. In the Indian law jurisprudence of this Court, the implied repeal of statutes is not favored. *Morton v. Mancari*, 417 U.S. 535 (1974).

If, as the District Court believed, the tax exemption of all reservation Indian lands is restored by force of the

---

[4] None are alleged in the record, and in any event, the relief provided by Congress from a forced fee patent, not accepted by the grantee, is tender to the Secretary of Interior, for cancellation, within the applicable trust period (25 U.S.C. 352a) and application thereto for reimbursement of any tax payments made in the interim (25 U.S.C. 352c).

IRA generally and its repudiation of the old policy, then the specific tax exemption *language* of Sec. 465 is without effect. By the same logic, the termination acts, by which many Indian reservations were dissolved in the 1950's,[5] could be deemed to have been repealed and the reservations restored by operation of the Indian Land Consolidation Act, which was based on the same Indian land consolidation policy as the IRA and indeed which incorporated the IRA's *mechanism* (25 U.S.C. 465), by specific reference,[6] for this purpose. (Act of January 12, 1983, 25 U.S.C. 2201, *et seq.*)

Of particular relevance to this case is the Act of August 31, 1964, PL 88-540, § 1, 78 Stat. 747, which amended the Act of July 28, 1955 (25 U.S.C. 608), governing purchases of land for the Yakimas. The 1955 Act, PL — -188, was one of several during the 1950's which, in apparent response to the tribal elections which left many tribes out of IRA coverage,[7] authorized the Interior Secretary to re-acquire for the Yakima's, from within the Reservation, lands previously allotted to members and still in trust or restricted status. It also authorized sale of tribally owned trust lands to members and in kind exchanges of land.

The 1964 amendment incorporated the 1955 statement of purpose[8] and authorized the purchase of *fee* lands *or*

---

[5] See e.g., Menominee Termination Act of June 17, 1954, 68 Stat. 250, P.L. 83-399; Klamath Termination Act of August 13, 1954, P.L. 83-587.

[6] The ILCA, P.L. 97-459, Title II, § 202, 96 Stat. 2517 (now 25 U.S.C. 2202) brings some tribes, who earlier rejected coverage of IRA in tribal elections, under the IRA's Sec. 5, the land reacquisition provision.

[7] Cohens Handbook of Federal Indian Law, 1982 ed. Ch. 11, Sec. B1, p. 614, n.19.

[8] For the purpose of effecting consolidations of land, situated within the Yakima Indian Reservation in the State of Washington,

restricted lands for the Tribe, from anywhere in the area ceded by the Tribe to the United States, Sec. (a) (1) (25 U.S.C. 608(a) (1)). Section (c) of the Act (codified as 25 U.S.C. 608(c)), addressed the tax status of the lands acquired for the Yakimas as follows:

> "(c) In all cases in which the Secretary is acquiring for the Yakima Tribes lands or interests in *lands presently* held *in trust* or under restrictions for the benefit of an individual Indian, title shall *be taken* in the name of the United States in *trust* for the Yakima Tribes. In all cases in which *land* being purchased is *presently* held by the grantor *in fee simple*, title *shall be taken* for and held by the Yakima Tribes *in fee and* such land *shall not*, by reason of its being owned by the tribes, *be exempt from taxation* in accordance with the laws of the State of Washington. (emphasis added)

What is abundantly clear from this passage is that (1) the tax status of these lands follows their alienability (fee lands are taxable—trust lands are not) and (2) the Yakima legislation was not to be used to return fee lands to trust status. The first point is merely a recognition of the state of the law, regarding taxation of reservation Indian lands, as of 1964. The second point was changed by the Acts of November 1, 1988, PL 100-581, § 213, 102 Stat. 2941 and May 24, 1990, PL 101-301, § 1(a) (3), 104 Stat. 206, so that now any lands acquired for the Yakimas under Sec. 608 or 465 *must* be acquired in trust. This has the effect of restoring tax exemptions to new acquisitions, one by one,[9] in accord with the principal estab-

---

between the Yakima Tribes of Indians and individual members of the tribes and other Indians, for the mutual benefit of the tribes and the individual members thereof, the Secretary of the Interior is authorized in his discretion to—

[9] Indeed this is the inferable prupose of the legislation, the 1964 Act having been brought sharply to the attention of the Tribe with the briefs of the County to the District Court in April, 1988 (Dist. Ct. Docket Nos. 20 and 25).

lished by Congress, that fee liens are taxable, while trust lands are not.

3. **The United States has repeatedly affirmed the view that reservation Indian fee lands, such as those involved in this case, are taxable.**

This principle was frequently supported in the actions and pronouncements of the United States Interior Department, and attorneys advising and representing the Government from 1924 until 1980. By opinion of December 24, 1924, Solicitor Edwards interpreted the 1906 amendment to Sec. 6 (the First Proviso of 25 U.S.C. 349) to mean that upon the issuance of a voluntary fee patent to an Indian of the Colville Reservation, *before* the expiration of the original 25-year period of the trust patent, the property became subject to state taxation. 50 I.D. 691. Solicitor Finney, by opinion of June 30, 1930, interpreted Section 6 in the case of a fee patent issued *after* the passage of the full 25 years, as provided for in the original 1887 Act, and against the contention that the "permanent home" and "perpetual use" language of the Nez Perce Treaty (14 Stat. 647) carried with it a tax exemption which survived the patent. The Solicitor concluded that the fee lands were taxable. 51 I.D. 133.

The Brief of the United States for Petitioner in *Squire v. Capoeman*, S.Ct. #55-134 at p. 13, n.4, and the Brief of the United States in *U.S. v. Mitchell*, S.Ct. #78-1756 at pp. 23-24, both support the position of the County in this case. In the Brief of the United States as Petitioner in *Squire v. Capoeman*, Supreme Court No. 55-134, the Solicitor discussed the effect of 25 U.S.C. 349 as viewed by the United States:

> Although not relied on by the courts below, it may be pointed out that Section 6 of the General Allotment Act, as amended by the Act of May 8, 1906 (App. pp. 42-43), empowered the Secretary of the Interior, in certain circumstances, to issue a fee

patient to competent allottees and provided that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Since it had never been the policy of the United States to levy direct taxes on lands because of the constitutional requirement of apportionment, this provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation.

In the Brief of the United States, as Petitioner, in *United States v. Mitchell*, Supreme Court No. 78-1756, the Solicitor discussed the purpose and effect for the holding in trust of Indian lands allotted under the General Allotment Act:

> The General Allotment Act thus did not, as the Court of Claims implicitly concluded, anticipate the United States would undertake broad management responsibilities as a statutory trustee for the allotted lands. The allottees were expected to occupy and manage the land, enjoying all its use in agricultural and grazing activites. The United States undertook to "hold the land * * * in trust" *not* with the objective of overriding or controlling the Indians' right to exclusive use and possession of the land, but instead for the limited purposes of (a) restraining improvement alienation of the land by the allottees and (b) affording an *immunity from state taxation for the period* during which legal title remained in the United States. 13 Cong. Rec. 3211 (1882) (Senator Dawes). (Brief of Petitioner at p. 24.) (emphasis added; footnote omitted)

From the Brief of the United States as Amicus Curiae supporting certiorari in these cases, it appears the position of the Government on this issue has undergone a recent change, one which Yakima County believes is unwarranted.

Finally 25 C.F.R. 151.10(e), adopted in 1980, requires certain factors to be weighed by the Interior Depart-

ment before Indian fee lands are taken into trust status, including the tax effects on local governments. Unless the fee lands are taxable, such trust taking would have no tax effects on local government.

4. The decision of this Court in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) is not inconsistent with the tax authority asserted by Yakima County in this case.

In 1976, the Court decided two significant state tax cases under the Mescalero/McClanahan standard. The issue in *Bryan v. Itasca County*, 426 U.S. 373 was whether 28 U.S.C. 1360 subjected to Minnesota property taxes the mobile home of an enrolled Chippewa Indian situated on trust land in the Chippewa Reservation. 28 U.S.C. 1360, was enacted August 15, 1953 as a part of what is popularly known as Public Law 280 (67 Stat. 589). Section 4 of the Act, the portion at issue in *Bryan*, gave Minnesota "jurisdiction over civil causes of action involving reservation Indians and arising in Indian country" (defined in the statute so as to include the Chippewa Reservation); and it applied to such Indians and their property "those civil laws . . . that are of general application to private persons or private property". The Court, in deciding against the taxing authority, interpreted the statute as only a grant of jurisdiction to hear and decide, in state court, lawsuits involving reservation Indians. This conclusion was based on the context and legislative history of PL-280 and the long-standing canon of construction taken from Indian treaty law, that ambiguities in Indian statutes are resolved in favor of Indians (citing *McClanahan*) because:

> "Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] [10] immuity and allow states to treat Indians as part of the general community." (citation omitted)

426 U.S. at 392.

---

[10] Bracketed passage in original.

The other 1976 case, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, followed the approach of *McClanahan* in holding that the State of Montana lacked taxing authority over the cigarette sales and personal propetry of reservation Indians, despite the clause of 25 U.S.C. 349 (Act of Feb. 8, 1987, ch. 119, Sec. 6, 24 Stat. 390), which subjects Indian allottees to the civil laws of the state, generally.

The issue in *Moe* most relevant to this case is whether 25 U.S.C. 349 authorized the State of Montana to tax the motor vehicle of an Indian merely because the Indian *resided* within the reservation. The State of Montana did not distinguish between Indians residing on fee land and those residing on trust land but did rely on 25 U.S.C. 349, apparently taking the view that since considerable reservation lands had been patented in fee, that the property of all reservation residents was subject to taxation. Since real property taxes were not involved, the proviso relied on by the County here was not referred to.[11] In effect, Montana asked the Court to extend Sec. 349 beyond its terms and beyond the rule of *Goudy* in furtherance of the assimilation policy, already since repudiated with the IRA in 1934. The Court, reasonably enough, concluded that the statute's grant of general civil jurisdiction over a fee patentee did not include power to tax the personal property of an Indian who may or

[11] Since Montana did not limit its asserted taxes to sales by or property of Indian patentees under 349, or their successors, even the connection with the first clause of Sec. 349 was a tenuous one. In general, Montana's position was that since some reservation Indians were subject to Montana laws and some reservation Indian property was taxable, all reservation Indians and all their property should be so. Indeed, the main argument of Montana in the case was one of equal protection. See briefs of Montana in Supreme Court #74-1656/75-50, generally. It is significant that the Court excerpted this part of Sec. 349 in its opinion at 425 U.S. 477 and omitted any reference to the proviso relied on by Yakima County in this case.

may not have been even a successor in interest to any patentee. Thus the holding in *Moe* did not represent the repeal or nullification of Sec. 349 and its authorization to tax. Rather it is a sensible refusal to go beyond its plain terms, in view of the change in federal policy which occurred after the enactment of the statute.

Despite the factual differences between *Moe* and the present case, an examination of the reasoning and principles of *Moe* may also shed light on the problem presented here. Let us then examine the grounds upon which the *Moe* decision was based. They were: Clear congressional consent for state taxation is required (*id.* at 476); the statute relied on does not clearly refer to personal property or sales taxes (*id.* at 477); the treaty and statutes used in resolving *McClanahan* and those relevant to *Moe* were "essentially the same" (*id.* at 477); there was no case authority for the extension of Section 6 to these particular taxes, while there was a body of complex jurisdictional statutes adopted after Section 6 which limited the reach of state law within reservations (*id.* at 479); the policy of assimilation, on which the Allotment Act was based, was repudiated by the adoption of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. 461, *et seq.* (*id.* at 479); the checkerboard pattern of mixed state/federal jurisdiction in reservations is impractical and undesirable and "eschew[ed]" by both the Congress and the Court (*id.* at 478); and the challenged Montana taxes conflict with the controlling federal statutes and therefore must give way under the Supremacy Clause (*id.* at 480-481, n.17).

None of these reasons should be a barrier to Yakima County's taxes in this case. Sec. 349 specifically refers to *taxation* of fee patented lands, and Congress' consent is unmistakable. The statutory context of this case is thus different from that of *McClanahan* where the applicable statute (the Buck Act) was neutral as to income taxes upon reservation Indians. There is clear case authority

for at least the property tax involved in this case. *Goudy v. Meath, supra.* The statutes adopted since 1887, at least as they relate to this case, are in harmony, not conflict, with the County's position. (pp. 13-19, *supra*). In particular, the IRA, though it reflected a change in congressional policy during the 1930's toward Indian tribes and reservations, recognized the status quo in regard to what we now call the "checkerboard pattern" and its tax aspects.

Implied repeal of statutes is disfavored in the law. In the absence of a clear, affirmative showing of an intention to repeal, the only permissible justification for implied repeal of one statute by another is that the two are irreconcilable. When two statutes are capable of coexistence, the courts must give effect to both unless Congress has clearly expressed a contrary intention. *Morton v. Mancari*, 417 U.S. 536 (1974); *Administrator of FAA v. Robertson*, 422 U.S. 255 (1975). The Allotment Act and its taxability-of-fee-lands rule (25 U.S.C. 349) are easily and properly reconciled with the Reorganization Act by allowing state taxation of those reservation lands patented in fee before 1934 (and not yet re-acquired according to IRA Sec. 5), by preserving the trust status (and consequent tax exemption) of reservation lands never patented in fee, and by restoring the trust status (and tax exemption) of those lands reacquired according to the terms of the Act by the United States for those Indians and tribes covered by the IRA.

Yakima County respectfully submits that there is no implied repeal of the power of states and counties to tax reservation Indians' fee lands. Moreover, such repeal, if found by this Court, would raise a set of other imponderable questions related to overlapping Indian and non-Indian interests created in the post-Allotment Act era. *E.g.*, lands owned by partnerships of Indians with non-Indians or by marital communities of mixed status, mortgagors, mortgagees, contract buyers, contract

sellers, holders of easements, etc. These problems need not and ought not be thrust on the County or the courts.

Since this Court's ambiguous 1976 reference to "checkerboard" jurisdiction in *Moe*, it has decided the case of *Washington v. Confederated Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) in which the Yakima Nation had challenged the legality of Washington's assumption of fairly broad civil and criminal jurisdiction over Indian reservation lands in Chapter 36, 1963 Washington Laws (RCW 37.12). Just as the statutes authorizing the taxes at issue in this case, those at issue in *Washington v. Confederated Tribes* had a "checkerboard" effect because they resulted in state jurisdiction over matters on fee lands, but not over matters on trust lands. The Court, at 439 U.S. 501, disposed of the Tribe's argument against checkerboard jurisdiction, stating in pertinent part as follows:

> "The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. [citations] . . . The land-tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the tribes with those of the States are strikingly similar. [citations] In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.

439 U.S. 502.

A more detailed analysis of *Moe* was done by the Court of Appeals and appears at Cert. Pet. #90-408 App. 15a-27a. Beyond that analysis the County will only urge this Court not to expand the narrow holding into this markedly different case.

5. Other relevant cases from this Court support the taxation of these reservation Indian fee lands.

Goudy v. Meath, 203 U.S. 146 (1906), holding that reservation Indian fee lands are properly subject to taxation under Sec. 6, has never been overruled by this Court. Indeed the observations and rulings of this Court in subsequent cases are consistent with and support this rule. *Squire v. Capoeman*, 351 U.S. 1, considered the question of whether the sale of timber from allotted reservation lands held in trust for a Quinault Indian could be taxed under Internal Revenue laws. The Court, per Chief Justice Warren, resolved the question by reference to 25 U.S.C. 349, reasoning that by subjecting allotted lands to taxation upon the issuance of the fee patent, Congress revealed its intent to shield the trust allotment (including timber harvested therefrom) from taxation until the termination of the trust. The Chief Justice made specific reference to the proviso of Sec. 349, saying:

> The literal language of the proviso evinces a congressional intent to *subject* an Indian allotment to *all taxes* only *after* a patent in fee is issued to the allottee. This, in turn, implies that, *until* such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted. (emphasis added)

351 U.S. 7-8.

Mescalero Apache Tribe v. Jones, supra, involved the validity of the two state taxes, one being a use tax on ski lift equipment owned by the Tribe and permanently attached to trust land acquired by the United States for the Tribe under 25 U.S.C. 465 (IRA Sec. 5) but located off the Reservation. After observing that states generally have full authority over Indians *outside* the reservation (411 U.S. at 148), the Court nevertheless held the fixtures exempt from the state taxes based on their connection with the underlying trust land, because:

> [U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. "Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." *United States v. Rickert, supra,* 188 U.S. at 442, 23 S.Ct. at 482. (quotation marks in original)

411 U.S. 158-159. This supports the position of Yakima County that, under the Allotment Act *and* the IRA, it is the trust or fee character of the land title, rather than the on or off-reservation location, which determines the taxability of Indian-owned property.

6. The decision of this Court in *Brendale v. Confed. Tribes of Yakima,* 109 S.Ct. 2994 (1989), should not be taken as limiting or qualifying the state taxing authority of 25 U.S.C. 349.

In *Brendale v. Confed. Tribes of Yakima,* 109 S.Ct. 2994 (1989), was initially brought by Respondent/Cross-Petitioner Yakima Tribe against the Petitioners/Cross-Respondents Yakima County, *et al.*, to obtain a declaration of the Tribe's exclusive power as against the County to zone non-member-owned fee lands inside the Reservation boundaries. 109 S.Ct. at 3002. This Court was divided on the issue, with four Justices of the view that the power to zone these fee lands belonged to the County and not the Tribe, three Justices of the view that the Tribe had the exclusive power, and two Justices holding that the power to zone any particular parcel of property depended on the pattern and prevalence of fee or trust land status in that portion of the Reservation where the subject property was situated. 109 S.Ct. at 3015-3017. As a result the Tribe was held to have exclusive authority to zone in the large "closed area" of the Reservation where fee lands are very sparse, but the County to have the

power in the balance of the Reservation (the "open area") because of the large percentage of lands therein owned in fee by the non-members of the Tribe. 109 S.Ct. at 3016.

The White plurality view was that the issuance of each fee patent under the Allotment Act had thereby divested the Tribe of the power to zone that parcel and that therefore such lands were subject to county zoning. 109 S.Ct. 3003-3004. However, he went on to say that the County's power over these was not unlimited, where particular land uses would have demonstrably serious impacts which would imperil the political integrity, economic security or the health and welfare of the Tribe. 109 S.Ct. 3008. The political integrity, economic security, health and welfare of an Indian tribe, as such, is a general description of those matters recognized within the notion of tribal sovereignty. It is a federally protected interest of the tribe, enforceable by injunction, which, as Justice White says "the Supremacy Clause requires state and local governments, including Yakima County zoning authorities, to recognize and respect . . ." 109 S.Ct. 3008. However, as observed by Justice White, this tribal sovereignty is limited to matters of tribal self-government and internal affairs. Yakima County submits that taxation of fee lands within the Reservation is not such a matter, according to Justice White's *Brendale* analysis. As he says at 109 S.Ct. 3005-3006:

> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." *Wheeler, supra,* 435 U.S. at 326, 98 S.Ct. at 1087. Those cases in which the Court has found a tribe's sovereignty divested generally are those "involving the relations between an Indian tribe and nonmembers of the tribe." *Ibid.* For example, Indian tribes cannot freely alienate their lands to non-Indians. . . . (quotation marks in original; citations omitted) . . .

Alienation of tribal trust lands by the United States, alienation by individual patentees of their own lands, and liability of these lands to involuntary alienation through tax enforcement are very specifically addressed by Congress in 25 U.S.C. 348 and 349. Indeed, this case was brought because of the tax relations between Indians and non-member tax collectors, and to prevent such an involuntary alienation of 139 specific properties. Prayer of Tribes Complaint, J.A. p. 6; Fact Stipulation, para. 3, J.A. p. 37. It thus follows that Yakima County's challenged property taxes do not implicate tribal sovereignty nor give rise to any injunction remedy as set forth by Justice White, because they are "external", rather than "internal" matters.

The fundamental differences between zoning and taxation counsel against application of a "Brendale test" to a tax case. The essence of zoning is the prevention of uses with negative effects on nearby properties. It is thus preventive in nature and local in effect. Property taxation, by contrast, operates directly on the individual property owner, via his property, so as to finance governmental benefits which are not local but enjoyed throughout the taxing entity's jurisdiction. It is essentially remedial, rather than preventive, in nature and non-local in effect. Moreover, if state (or county) and tribal governments have inconsistent zoning schemes, each is destructive of the other. This was recognized implicitly by both the White plurality and the Blackmun minority in *Brendale.* Multiple and differing taxation schemes operating on the same property or activity, however, are common and are legally compatible, as recently recognized by this Court in *Cotton Petroleum v. New Mexico*, 109 S.Ct. 1698 (1989). Whatever logic there may be to judging county zoning according to its effect on a neighboring tribal property, there is no such logic to judging county taxes according to their indirect effect on the tribal body politic.

The White plurality opinion also counsels against case-specific tests for zoning authority which could result in

shifting, transitory powers, engendering uncertainty as to the incidents of land ownership to the detriment of both governments and private land owners. 109 S.Ct. at 3007-3008. Due to the many factual variables in the property tax equation, the "Brendale test" as conceived by the Court of Appeals would create just the kind of chaos which Justice White sought to avoid. Such a test for county tax authority would subject county revenue and budgeting, in reservation areas, to an ever-shifting analysis of numerous facts with taxation of these lands switching on or off like an electric light.

In no two cases will the consequences of taxing reservation lands be the same for the home tribe. Consider the many factors to be weighed, including: (1) The relative amounts of fee and trust lands within the reservation; (2) the relative amounts of tribal-owned and member-owned fee lands; (3) the rates of tax within the reservation; (4) frequency of tax defaults by tribe members; (5) availability of tribal tax assistance programs for members; (6) the extent to which the lands to be taxed, or their owners, generate income for the tribe; and (7) the extent to which the lands to be taxed are actually used for tribal purposes. Each of these factors will not only vary from place to place, but also over time, so that if the Court of Appeals decision in this case becomes the law, these same fact questions may have to be litigated every few years as to most if not all the Indian reservations still existing in the United States. If the judgment of the Court of Appeals on this point is allowed to stand, tribes and their members may or may not benefit. But we can be certain that the rights and burdens of land ownership in large portions of the American West will be thrown into doubt which can only be mitigated through complex and costly litigation, county-by-county, reservation-by-reservation and, year-by-year. The sensible alternative to these accumulating years of lawsuits is to give

25 U.S.C. 349 its plain and intended meaning unless and until it is repealed by Congress and to reject any attempt to cut back its effect with a "Brendale test."

Ironically, several of the above factors could be influenced if not controlled by the tribes to the detriment of tribal members and county government.[12]

It is worth noting here that tribal powers rightly include control over standards for membership. *Roff v. Burney*, 168 U.S. 218 (1897); *Santa Clara Pueblo v. Martinez*, 436 U.S. 72, n.32 (1978). There are many reasons why a tribe may wish to relax the blood-quantum standard or other criteria for membership.[13] If tribal membership is held to create a blanket property tax exemption within reservation boundaries, internal tribal affairs could, especially in some counties, cause unpredictable disturbances in county tax revenues. Such a rule could create additional and undesirable political tension between county and tribal governments. Moreover, regardless of any change in membership standards or numbers within the reservation, if the tax exemption inheres

---

[12] For illustration, consider a tribe with ample corporate funds with which it carries on tribal welfare programs including loans to members which may be used to meet tax obligations. Such a thriving tribe should be practically unaffected by taxes on member-owned lands and thus, under the Circuit Court's reasoning would therefore itself be denied a tax exemption for its fee lands. If this same tribe depleted its available funds in the acquisition of fee lands within the reservation, cut back welfare and tax loan programs and stood by for the inevitable member defaults, the increasing relative impacts of state taxes on tribal welfare would likely result in valuable tax exemption for the tribe and those members still holding reservation lands, but at the expense of other tribal benefits, not to mention the general public purse.

[13] The widely publicized 1990 census results included a marked increase in the number of persons identifying themselves as Indians, an apparent reflection of the increasingly high value placed on ethnicity in our society. It would not be unreasonable for a given tribe to lower its blood-quantum requirement from, *e.g.* 1/4 to 1/8 or from 1/8 to 1/16, in furtherance of a similar sociological value.

in the Indian owner (the Tribe's view), rather than the property (the County's view), the well-known tax planning device of sale-leaseback acquires a new dimension—as a device by which non-Indian property owners on the reservation can share the tax immunity of their Indian neighbors. Yakima County believes that reservation people should not be induced to collude in this way for the avoidance of taxes.

It is also important that, though for different reasons, the County and the Tribe in their Petitions for Certiorari and the United States as Amicus Curiae in its Brief to the Court supporting those petitions, are unanimous in the view that this case should not be decided under Justice White's "Brendale test".

7. The inclusion of reservation Indian fee land within "Indian country" for purposes of criminal jurisdiction or otherwise does not negate the taxability of the subject lands under Sec. 349.

18 U.S.C. 1151 reads:

> § 1151. Indian country defined
>
> Except as otherwise provided in section 1154 and 1156 of this title [18 U.S.C. §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 U.S.C. §§ 1151 *et seq.*], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

(Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757; as amended by Act of May 24, 1949, ch. 139, § 25, 63 Stat. 94.)

It has been argued by the Tribe in this case that by defining "Indian Country" in 1151 to include reservation fee lands, Congress deprived the states and counties of the authority previously granted under Sec. 349 to tax these fee lands (if owned by Indians). After the rejection of this theory by the Court of Appeals (Appendix to Cert. Pet. #90-408, pp. 21a-22a, 24a). The United States, Amicus Curiae, in its Brief to this Court on certiorari refashioned it. The United States now argues (Brief, pp. 15-16, n. 10) that 1151 simply "changed the effect" of Sec. 349 so as to forbid state taxes on Indian fee lands inside, but not outside, the reservation boundaries; And that it does so by "codif[ying] the pre-emptive principal embodied in the "many and complex intervening jurisdictional statutes" enacted since the 1906 revision of Section 6 of the General Allotment Act, that are "directed at the reach the state and within reservation lands." *Moe*, 425 U.S. at 479 (footnote omitted)". This theory still does not withstand scrutiny.

Section 1 of the General Allotment Act (25 U.S.C. 331) provides the basic authority for the making of the allotments referred to in 25 U.S.C. 348 and 349. These allotments are of lands from inside the reservation. Sec. 331, the first sentence, reads:

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

It is too well established to require citation that the purpose of the Allotment Act was to dismantle *the reservations* to be then absorbed into the surrounding states and counties. For the United States now to argue that Sec. 349 should have two different applications, one outside and one inside the reservation, is disingenuous.

As noted by the Court of Appeals in this regard, 18 U.S.C. 1151 and its definition of "Indian country" are criminal provisions, and do not designed as such for application in a civil context. Sec. 1151 was inserted in the Indian portion of the United States Criminal Code as a part of a large scale criminal code revision in 1948 and its 1949 amendments. Act of June 25, 1948, Ch. 646, P.L. —-773; Act of May 24, 1949, Ch. 139, P.L. —-72. However, as the United States has asserted, this section and the term "Indian country" as used there have been resorted to for guidance in resolving some civil cases where the primary civil statute was not sufficiently specific. Therefore the cases cited by the United States for this theory may deserve mention.

In *Solem v. Barlett*, 465 U.S. 463 (1984), the issue was whether the 1908 opening of the Cheyenne River Sioux Reservation to non-Indian settlement had the effect of diminishing the size of the Reservation. Resort was had to § 1151 in answering this question because, as the Court explained, in adopting the 1908 settlement statute, Congress did not anticipate the question raised in the case and therefore failed to provide an answer to it. 465 U.S. 468.

Mattz v. Arnett, 412 U.S. 481 (1973) likewise involved the continued reservation status of another area which had been opened to non-Indian settlers by an act in which clear language of termination for the reservation could not be found. Section 1151 again provided a helpful reference which was used together with other collateral statutes 412 U.S. 505-506. *DeCoteau v. District County Court*, 420 U.S. 423 (1975) was another termination

case. The question was whether cession of a large portion of the reservation to the United States, followed by mesne transfer thereof to non-Indians, left the state with jurisdiction over acts occurring on these fee lands. The Court there held that the state did possess the questioned jurisdiction, based on the plain meaning of the applicable statute and its surrounding circumstances and legislative history. 420 U.S. 444-445.

McClanahan v. Ariz. Tax Comm., 411 U.S. 164, 177 (1973) was another case in which the statute (the Buck Act) which addressed the subject matter of the litigation (state income taxes on federal reservation residents) was *neutral* as to its application to reservation Indians. Again, the customary resort to Sec. 1151 as an analogous source.

Kennerly v. District Court, 400 U.S. 423 (1971), involved the issue of the effectiveness of a *tribal* grant of state jurisdiction (held ineffective), and neither Sec. 1151 nor the term "Indian country" was relied on. In *Williams v. Lee*, 358 U.S. 217, 220-222 (1959), the Court cited Sec. 1151 as illustrative of federal *criminal* jurisdiction principals 358 U.S. at 220.

In all these cases, either the Sec. 1151 definition of "Indian country" was not used to resolve the case, or it was used due to lack of sufficient detail for the Court's purposes in the primary statute on the subject. In 25 U.S.C. 349 we have *very* clear congressional assent to state taxation of fee lands, and resort to the criminal code for its definition of "Indian country" is simply not warranted. Indeed, to do so would be, in the language of *Rice v. Rehner*, 463 U.S. 733, to convert a canon of construction into a license for the disregard of congressional intent.

8. Relevant decisions of this Court support the application of excise taxes to the sale of otherwise taxable reservation Indian lands.

This Court has dealt at least twice with the issue of an excise tax on the transfer of Indian property. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943)

involved Oklahoma estate taxes on the transfer through probate of lands and other property. Some of the lands had been taxable in the hands of the decedent and some had been exempt. It was held that transfer of the lands which were taxable before the owners death was therefore subject to the estate tax, while transfer of the exempt lands was not.

Squire v. Capoeman, 351 U.S. 1 (1956) concerned capital gains tax on the sale of timber harvested from Indian trust land in the Quinault Reservation. The Court held that such sale was not taxable, but said with reference to Sec. 349:

> The literal language of the proviso evinces a congressional intent to *subject* an Indian allotment *to all taxes* only *after a patent in fee* is issued to the allottee. (emphasis added)

351 U.S. 7-8.

Though the tax was not upheld in *Squire*, this passage is a very plain endorsement for the application of Yakima County's state excise tax on the fee-patented lands involved in this case.

In addition to the personal obligation imposed by the Washington real estate excise statute on the seller, the sale of reality also creates a lien upon the property (82.45.070, Appendix, *infra*, p. 2a) which can then be enforced in the hands of the buyer. (RCW 82.45.080, Appendix, *infra*, p. 2a) If the Court determines that Yakima Indians cannot be required to pay the tax as called for in 82.45.080, the further question is presented whether the lien of 82.45.070 can properly be enforced in the hands of the buyer if the buyer is a non-Indian. The *Moe* case itself, in addition to the personal property tax discussed *supra*, involved the Montana tax on sales of cigarettes by reservation Indians from reservation smoke shops. It was held that the Indian sellers could lawfully be required to collect the sales tax on sales to

non-Indians because the burden of the tax fell on the non-Indian buyer. In *Washington v. Confed. Tribes of Colville*, 447 U.S. 134 (1980), the Court considered and upheld the authority of Washington to impose both a cigarette excise and general personal property tax on reservation sales of cigarettes by Indians to non-Indians. Recently, in *Oklahoma Tax Commission v. Potawatomi Tribe*, —— U.S. ——, 111 S.Ct. 905 (1991), the Court considered state sales tax on tribal sales of cigarettes from an off-reservation trust land location. In holding the sales to Indians were exempt and those to non-Indians were taxable, the Court followed *Moe* and *Colville* and rejected the argument, now made by the United States here, that the location of the subject being taxed (whether inside or outside a reservation) was determinative.

Yakima County submits that the applicable rules of *Oklahoma*, *Moe*, *Colville*, and *Potawatomi*, as well as the dicta in *Squire*, support the real estate excise tax at issue here, at least where the buyer is non-Indian.

9. A synthesis of applicable decisions of this Court affords a satisfactory test for state taxing power in this case.

A suitable approach to resolving the present case can be extracted from *McClanahan*, *Bryan*, *Rehner* and *Moe*: (1) determine whether there is a recognized tradition of Indian immunity from the challenged taxes (Rehner), (2) determine whether the applicable acts of Congress authorize the challenged taxes (McClanahan), and, where an established tradition of Indian immunity exists, whether the authorization is unmistakably clear (*McClanahan, Bryan*), (3) where genuinely ambiguities exist in the acts of Congress, resolve them in favor of the Indians, but without disregarding clear expressions of intent.[14] (*Rehner*)

---

[14] "We give this rule [resolving ambiguities in favor of Indians] the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define

CONCLUSION

Yakima County respectfully prays that this Court affirm the Court of Appeals as to county authority to tax the lands in this case and reverse the Court of Appeals as to the "Brendale test" qualification of such authority and as to authority to impose its real estate excise tax on sales of reservation Indian fee lands, at least those to non-Indian buyers.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney
Yakima County, Washington
JOHN V. STAFFAN *
Deputy Prosecuting Attorney
Room 329, Courthouse
Yakima, Washington 98901
(509) 575-4141
Counsel for Petitioners/ Cross-Respondents, Yakima County, et al.

* Counsel of Record

R. WAYNE BJUR
TIM WEAVER
COCKRILL, WEAVER & BJUR, P.S.
316 North Third Street
P.O. Box 487
Yakima, Washington 98907
(509) 575-1500
Counsel for Respondent/Cross-Petitioner

---

the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." 463 U.S. at 733-734, quoting from *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

APPENDIX

(United States Code, Title 25)

§ 465. Acquisition of lands, water rights or surface rights; appropriations; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title or sections 608 to 608c of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

(June 18, 1934, c. 576, § 5, 48 Stat. 985; as amended Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

(Revised Code of Washington)

82.45.070 Tax is lien on property—Enforcement. The tax herein provided for and any interest or penalties thereon shall be a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid, which lien may be enforced in the manner prescribed for the foreclosure of mortgages. [1969 ex.s. c 223 § 28A.45.070. Prior: 1951 1st ex.s. c 11 § 9. Formerly RCW 28A.45.070, 28.45.070.]

82.45.080 Tax is seller's obligation—Choice of remedies. The tax levied under this chapter shall be the obligation of the seller and the department of revenue may, at the department's option, enforce the obligation through an action of debt against the seller or the department may proceed in the manner prescribed for the foreclosure of mortgages and resort to one course of enforcement shall not be an election not to pursue the other. [1980 c 154 § 3; 1969 ex.s. c 223 § 28A.45.080. Prior: 1951 1st ex.s. c. 11 § 10. Formerly RCW 28A.45.080, 28.45.080.]